individual state employees in carrying out those procedures. I based my decision on California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980), in which the Supreme Court found that the active state supervision requirement was not met where the state merely enforced the prices set by the private parties without any review of the reasonableness of the prices or monitoring of market conditions. The purpose of the second prong is to prevent the state from authorizing private parties violating the antitrust laws without in some way regulating their conduct. Id. at 106.

Thus, I found that the focus of the second prong of the state action defense is on the procedures and regulations by which the state implements it regulation of the authorized collective rate-making. My decision made irrelevant plaintiffs'

argument that the regulators in the affected states were failing to properly supervise the rating bureaus as required by their respective state statutes because of improper payments. Plaintiffs' counsel supplied with their extensive discovery and my opinions on the state action defense, were able to legitimately conclude that plaintiffs' claims could not withstand defendants' imminent motion for summary judgment based on the state action defense.

The objecting states argue that the plaintiffs' counsel have taken too pessimistic a view of the plaintiffs' situation. They argue that the state action defense depends on each state's laws and thus that the strength of the defense varies from state to state. The only evidence the objecting states rely on, other than the letter from the assistant attorney generals from

Wisconsin, is the fact that the FTC has not dropped its case against the defendants in all the states. However, this fact by itself is insufficient to support an inference that the plaintiffs have a viable claim in the states where the FTC has continued its action, just as the fact that the FTC has dropped its case in some of the states does not mean that the plaintiffs necessarily have no viable claims in those states. The more important factor in my evaluation of the settlement is that the objecting states (with the exception of Wisconsin), which are clearly the parties best able to provide information on their own laws and regulations regarding defendants' collective rate-making, have failed to provide any evidence by affidavit or deposition testimony to support their assertions that the state action defense would not bar plaintiffs' claims in every

affected state. The objecting states are in effect arguing that their own laws impermissibly authorize the defendants to violate the antitrust laws and yet they provide no evidence to support their assertions and there is no indication that they themselves in their respective sovereign capacities have challenged the defendants' conduct.

Wisconsin is the only objecting state even to attempt to provide evidence that defendants are not protected by the state action defense under its regulatory scheme. Wisconsin argues in a letter to the court that Wisconsin regulators have failed to properly evaluate defendants' rate submissions prior to approving them. Wisconsin claims that this failure means that the second prong of the state action defense has not been met in Wisconsin. As I have noted earlier, I do not find Wisconsin's arguments persuasive.

Firstly, there is no indication that the alleged inadequate supervision by the Wisconsin regulators is attributable to inadequate regulatory procedures - the only relevant criteria under the second prong of the state action defense. Secondly, the settling parties strongly challenge Wisconsin's assertions that it failed to actively supervise the defendants' rating bureau activities. The defendants, in their reply to the letter from Wisconsin, filed on May 15, 1986, refer to the deposition of Norman Wirtz, the insurance analyst employed by the Wisconsin Insurance Commissioner, which was taken as part of the FTC proceeding. The deposition indicates that the rate proposals submitted by the rating bureau in Wisconsin were extensively reviewed prior to their approval. The defendants also note that their submitted rate proposals were accompanied by extensive

written justifications. Thus, I find that the objecting states, including Wisconsin, have done nothing more than present speculative, unsupported challenges to plaintiffs' counsel's evaluation that plaintiffs' claims would stand almost no chance of succeeding in the face of the state action defense in any of the affected states. I will not upset the settlement negotiated by the parties based on the speculative challenges of the objecting states. Reynolds, 584 F.2d at 286.

Although the state action defense in my view presents an almost insurmountable obstacle to plaintiffs' ability to establish defendants' liability, two other substantial obstacles also exist in this case. The first is the exemption from antitrust liability provided for the "business of insurance" by the McCarran-Ferguson Act, 15 U.S.C. § 1012,

where the state regulates the business. As with the second prong of the state action defense, the relevant inquiry in determining whether the state regulates the business of insurance is whether the state has established procedures to regulate the conduct, not whether those procedures were properly carried out. See Schwartz v. Commonwealth Land Title Insurance Co, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). It is my preliminary conclusion that title search and examination services, which are the main focus of plaintiffs' antitrust claims, are part of the business of insurance since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies, which would fall under the protection of the McCarran-Ferguson Act. Accord Schwartz, 374 F. Supp. at 572-75 (Title insurance company is protected by

McCarran-Ferguson Act from antitrust liability for collective rate setting of "seller-charge" which covered cost of services incidental to transfer of title, including title search, as part of the business of insurance). But see United States v. Title Insurance Rating Bureau of Arizona, 517 F. Supp. 1053 (D. Ariz. 1981), aff'd, 700 F.2d 1247 (9th Cir. 1983), cert. denied, 467 U.S. 1240 (1984) (escrow services held not to be part of the business of insurance). Although no discovery was conducted specifically on the McCarran-Ferguson Act issue, it would seem that the discovery on the state action defense which showed the involvement of the affected states in the collective rate-making process indicates that the McCarran-Ferguson Act also poses a very significant if not insurmountable obstacle to the establishment of liability against the defendants.

The final obstacle faced by plaintiffs, in even establishing a cause of action, is the filed tariff doctrine set out by the Supreme Court in Keogh v. Chicago v. Northwestern Ry., 260 U.S. 156 (1922).[7] Under this doctrine, the plaintiffs may have been unable to recover damages based on the allegedly anti-competitive rates charged by the defendants because those rates were approved by the state regulatory agency. City of Newark v. Delmarva Power & Light Co, 467 F. Supp. 763, 769 (D. Del. 1979). None of the objecting parties have made any mention of the risks posed by the McCarran-Ferguson Act or the filed tariff doctrine in their challenges to the settlement.

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7. The Keogh doctrine was recently reaffirmed by the Supreme Court in Square D Company and Big Building Supply Corp. v. Niagara Frontier Tariff Bureau, Inc, 54 U.S.L.W. 4520 (May 27, 1986).

The objecting parties also fail to address the difficulties plaintiffs would face in proving damages. There is no evidence that the rates arrived at by the rating bureaus are higher than those that would have been set had the collective rate-making not occurred. Furthermore, plaintiffs would have faced difficulties in maintaining a class action throughout the proceedings. Although for purposes of settlement I have found that certification of a class is appropriate, new problems would arise if the factual issues in this case had to be fully litigated. The decision as to liability and damages in each affected state might well have required the formation of subclasses or separate classes. The objecting states themselves suggest that damages and possibly impact may have to be proved for each class member. Joint Memorandum of Objecting States, p.13. Thus I conclude

that the difficulties set out above would make it extremely unlikely that the plaintiffs would have been awarded any relief, monetary or injunctive, on their claims had this case not settled.

In addition to the substantial legal difficulties outlined above, plaintiffs also faced the practical difficulties of pursuing this complex litigation. This action was settled prior to defendants' filing their anticipated motion for summary judgment based on the state action defense. The expense and effort required to respond to the anticipated motion would have been very substantial. Furthermore, defendants, having invested equivalent time and expense in preparing the motion, may well have been less likely to agree to a settlement once the motion had been filed. Even in the unlikely event that plaintiffs were able to avoid summary judgment on the state action defense,

further motions based on the other defenses would likely follow. These motions and the responses to them would require additional discovery and delay. The actual trial or trials of this case or these cases would also be complex and lengthy involving difficult issues of liability and damages. Thus, even if these cases were to proceed, the delay and expense involved in obtaining any relief for the class would be enormous.

The fairness and adequacy of the settlement can only be properly evaluated by taking into consideration the overwhelming risks which plaintiffs faced in achieving any benefits through litigation. Bogosian v. Gulf Oil Corp., 1985-1 Trade Cas. (CCH) ¶ 65,510, p. 65,549 (1985). The settlement provides two distinct benefits to the plaintiff class. The first is a $5,000.00 enhancement of plaintiffs' title insurance

policies. Agreement of Settlement, ¶ 7(B). The second is an injunction against defendants' participation in rating bureaus until December 31, 1987. Agreement of Settlement, ¶ 7(A). The objecting parties argue that these benefits are of no value to the plaintiffs and thus are inadequate. I find, however, that both the monetary and the injunctive provisions of the settlement are of substantial value to the plaintiffs, even though they may not provide any practical monetary relief to some members of the class. Given the risks posed by continued litigation, the value of the settlement is fair and adequate compensation for plaintiffs' waiver of their claims.

The defendants have agreed to increase the amount of coverage on all title insurance policies issued by them to class members in the affected states. The defendants have also agreed to provide

without charge the last $5,000 of coverage on new policies issued within a year to class members who either bought title insurance for the benefit of others or who bought title insurance from a nondefendant company during the relevant period, from January 1, 1981 to December 31, 1985. The benefits provided in this section of the settlement are applied automatically to the plaintiffs' insurance policies and the defendants have agreed to make good faith efforts to inform class members of the benefits of the settlement when class members are entitled to those benefits (i.e., when an insured class member makes a claim under his policy, or when an insured class member is entitled to a re-issue rate discount on a new policy and the charge for the new policy is affected by the enhancement provisions; or when a non-insured class member applies to purchase a new policy to which the

settlement applies). Agreement of Settlement, ¶ 7(B)(3). Any violation of this provision, which will be contained in the injunction issued pursuant to the settlement, would be enforceable in a contempt proceeding.

The additional $5,000 of title insurance coverage is a benefit to all the class members, regardless of whether or not they make claims on their title insurance policies. The additional coverage represents an additional shifting of the risk of a failure of title from plaintiffs to defendants. As with any insurance, this shifting of risk by itself represents a benefit to the plaintiffs. Although the title search which accompanies the issuance of a title insurance policy is meant to minimize and/or eliminate the risk to the defendants that the title will later prove in some way defective, the defendants have

presented evidence that title insurance companies nationwide have paid out, on the average, close to eight percent of their gross operating revenue on losses in the period between 1981 and 1984. Affidavit of Robert L. Stratton, ¶ 19.[8] Thus, title insurance still represents the shifting of an appreciable risk to the defendants and any additional shifting of that risk is a valuable benefit to the plaintiff class whether or not a loss occurs or a claim is made. Defendants' have asserted that it would cost a class member approximately twenty dollars to purchase the additional coverage provided by the settlement. Affidavit of Robert L. Stratton, ¶ 11. The additional insurance

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8. The objecting states argue that the pay out rate is below 5%. However, their figures are based only on title insurance companies in Ohio, rather than on the nationwide sample on which defendants' figures are based. I place more weight on defendants evidence because it is based on a larger sample.

is, of course, of greater value to those class members whose property has increased in value and who suffer a loss due to a defect in title. The fact that some class members receive this added benefit does not alter the fact that all the class members receive some benefit regardless of whether they ever file a claim.

The additional insurance also provides benefits to the class members because it entitles them to higher reissue and refinance rate credits on policies they may buy in the future. Affidavit of Robert L. Stratton ¶ 12. This benefit arises because these credits on new policies are usually based on the amount of coverage of the old policy. The value of this benefit is not dependent on whether a class member ever files a claim on his title insurance policy. Thus, I conclude that the policy enhancement provision provides a distinct benefit to

the plaintiff class.

Some of the objecting parties including the objecting states argue that the benefits conferred by the settlement do not adequately reflect the fact that some of the plaintiffs were purchasers of large title policies while others were purchasers of small policies. However, one of the legitimate purposes of a settlement is to avoid the necessity of litigating the claims of the individual class members. Further, it is not at all clear that any alleged overpayments for title services would be directly proportional to the amount of coverage of the title insurance policy. Apparently purchasers of large policies are often able to obtain discounts from the defendants. Defendants' Memorandum at p.15. There is no evidence that the challenged services are priced directly on the total amount of the title insurance coverage. The practical

difficulties involved in establishing a proportional enhancement of plaintiffs' policies would substantially increase the cost of the settlement to the defendants and it was reasonable for the plaintiffs' counsel to accept a uniform enhancement as a compromise in the settlement negotiations.

Some of the individual objectors argue that because of their circumstances, they will not benefit from the enhancement provision. Even if I accept the truth of their assertions, they still benefit from the injunctive relief. Also, I would not disapprove the settlement based on a small number of class members who may not benefit from the enhancement provision when to do so would deny all the benefits of the settlement to the entire class. There is no evidence that there are a significant number of class members who will not benefit from the enhancement

provision.

The settlement also provides for benefits to class members who either purchased title insurance for the benefit of others or who purchased title insurance from a nondefendant company. These class members receive the last $5,000 of coverage free on any new policy which they purchase from a defendant within a one-year period running from the final approval of the settlement. The free coverage will reduce the cost of the premium by approximately $20.00. Affidavit of Robert L. Stratton, ¶ 17. The free coverage will also be available for class members who are paying for a new policy when refinancing a home. Given the recent drop in interest rates, it is likely that an increased number of class members will benefit from this provision. Id. at ¶ 18. Many of the objecting parties argue that this provision is

inadequate because it does not allow the plaintiffs to aggregate the free policy coverage they would receive for each title insurance policy purchased during the relevant period and because the benefit provided by this provision only extends for one year. These objections are without merit because, while the alternatives they suggest would increase the benefit to the class members, the adequacy of the settlement is measured not by the absolute value of the settlement, but by the relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is inadequate. I note that with the exception of the state objectors, none of the objecting parties even mention the

difficulties plaintiffs would have succeeding on the merits of their claims. The majority of the individual objectors to both the enhancement provision and the new policy provision do no more than complain that they would prefer to receive money rather than increased policy coverage. However, with a class that is estimated to number over three million, even the smallest of direct monetary awards would result in the defendants paying out tens of millions of dollars. It is not surprising then that the defendants refused to agree to any direct monetary settlement when faced with plaintiffs' extremely weak claims. It is also worth noting that out of a class of over three million, only twenty objections were filed other than those filed by the states.'

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9. Counsel for plaintiffs and defendants received hundreds of inquiries

In addition to the monetary benefits provided by the settlement, the plaintiff class also benefits from the injunctive relief specified in the settlement. The settlement enjoins the defendants from participating in any way in rating bureaus

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Footnote 9 continued

as the result of the published notice and sent out a copy of the settlement agreement to each inquiring party. See Perelman Affidavit, Exhibit A (list of parties making inquiries to plaintiffs' counsel), and Defendants' Memorandum, Exhibit G (list of parties making inquiries to defendants' counsel). Allowing for overlap in the lists, close to 600 people received copies of the settlement agreement from counsel for the settling parties. Even if I were to make the unlikely assumption that only those people who made inquiries had received notice of the proposed settlement, the number of objectors still comes to less than 5% of the inquiring class members. See Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1973), cert. denied, 419 U.S. 900 (1974), reh'g denied, 420 U.S. 913 (1975). (Class action settlement approved even though 20% of the class objected). Thus, I find that the response of the class to the settlement is a factor favoring approval of the settlement.

in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin until December 31, 1987. In the other affected states - Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming - the defendants are prohibited from participating in rating bureaus unless the state has a clearly articulated and affirmatively expressed policy permitting collective rate-making and actively supervises the process. Agreement of Settlement, ¶ 7(A). Plaintiffs' claims are based on the allegedly anticompetitive effects of collective rate-making as to discrete title insurance services, and thus the injunctive relief limiting participation in rating bureaus, as to all title insurance services, provides extensive relief responsive to plaintiffs' claims. The defendants, in the states where they are barred from collective rate-making, are foregoing their right to

participate in collective rate-making even though it otherwise would satisfy the requirements of Southern Motor Carriers. In the other states, the defendants are foregoing their reliance on the other defenses to liability, in particular the McCarran-Ferguson Act defense. Plaintiffs are receiving a benefit in these states that they could not have received at trial, even if ultimately successful, since defendants are foregoing their right collectively to set prices for title insurance premiums as well as settlement services. Title insurance premiums are clearly covered by the McCarran-Ferguson Act. Thus, the injunctive provisions of the settlement provide a substantial benefit to the plaintiff class, beyond that which is sought in the complaint or could even arguably be obtained upon totally successful litigation.

The objectors argue that the

injunction is inadequate since it only applies until December 31, 1987. However, this challenge, like that to the monetary aspects of the settlement, is without merit because it overlooks the fact that plaintiffs would not be likely to receive any injunctive relief were this case to proceed. I also reject the argument that the injunction is valueless because the defendants have already withdrawn from rating bureaus in the affected states. Absent the settlement, there is nothing to prevent the defendants from rejoining rating bureaus in any of the affected states, with the exception of New Mexico where the statutory rule permitting collective rate-making has been eliminated.

The objecting states also argue that only a cash recovery is an appropriate remedy for a price-fixing violation. However, given the weakness of plaintiffs' claims, the defendants assert, and it

seems reasonable to believe, that they would never agree to a cash settlement. Furthermore, non-cash recovery settlements have been approved in antitrust class actions. See In re Cuisinart Food Processor Antitrust Litigation, 1983-2 Trade Cas. (CCH) ¶ 65,680 at p.69,474 (D. Conn. 1983), and cases cited therein. Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

The adequacy of the settlement is not adversely affected by the fact that the monetary provisions are subject to approval by the regulatory agencies in the affected states. The defendants have agreed to use their best efforts to obtain approval of the settlement. Agreement of

Settlement, ¶ 2. To date, the defendants have submitted letters from eleven of the thirteen affected states establishing that those states agree with or at least do not oppose the settlement. Defendants' Memorandum, Exhibits B-F; Defendants' Supplemental Memorandum, Exhibits A-F. Ohio and Wisconsin, the two remaining states, have yet to state a position with regard to approval of the settlement. However, even if these states were not to approve the monetary portions of the settlement, the class members in those states would still have the substantial benefit of the injunctive provisions. Therefore, the objecting states' concern over regulatory approval does not alter the conclusion that the settlement provides fair and adequate benefits to the class.

The objecting states also challenge the settlement as having an illegal

anticompetitive effect. This argument is based on the fact that class members who purchased title insurance for the benefit of others or who purchased from non-defendant companies will have to purchase any new policies from the defendants in order to obtain the monetary benefits of the settlement by way of insurance policy enhancement. The objecting states have provided no evidence in support of their assertions of anticompetitive effect nor have any of the nondefendant title insurance companies, who would be the alleged victims of any anticompetitive effect, presented any objections to the settlement. Also none of the state insurance departments, who are responsible for approving rates, have raised any challenge to the settlements as to purported anticompetitive effect.

I find that the settlement in this case is distinguishable from that in New

York v. Dairylea Cooperative, 547 F. Supp. 306 (S.D.N.Y. 1982), appeal dismissed, 698 F.2d 567 (2d Cir. 1983), where the court disapproved a settlement in an antitrust case because of its anticompetitive effect. The settlement in that case provided for a coupon plan under which the defendants were to distribute "cents-off" coupons for their product over a five-year period. The court was concerned that the coupon plan was little more than a marketing program for the defendants which they could manipulate by controlling the timing and location of the coupons. Id. at 308. In this case, the defendants have no discretion on when or where to provide the benefits specified in the settlement. Also the court in Dairylea was concerned that the settlement made no attempt to specifically reimburse those allegedly overcharged in the past. Id. In this case the settlement benefits are targeted

directly at those who have bought title insurance in the past. Thus, I find that the concerns raised by the court in Dairylea are not present in this case. Furthermore, settlements involving redeemable coupons have been approved by other courts in the past. See In re Cuisinart, ¶ 65,680 at p.69,474, and cases cited therein.

My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to protect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost

insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement. The objecting parties were given ample opportunity to present and argue their objections. Therefore, pursuant to Federal Rule of Civil Procedure 23(e), I will approve the settlement of this antitrust class action suit.